

Introduced by Senator Calderon

January 22, 2009

An act to amend Sections 10085.5 and 10177 of, and to add Section 10147.6 to, the Business and Professions Code, to amend Section 2945.1 of, and to add Sections 2944.6 and 2944.7 to, the Civil Code, and to amend Sections 22161 and 22301 of, and to add Section 50002.5 to, the Financial Code, relating to mortgage loans.

LEGISLATIVE COUNSEL'S DIGEST

SB 94, as introduced, Calderon. Mortgage loans.

(1) The Real Estate Law provides for the regulation and licensure of real estate brokers and real estate salespersons by the Real Estate Commissioner. The California Finance Lenders Law provides for the regulation and licensure of finance lenders and brokers by the Commissioner of Corporations. The California Residential Mortgage Lending Act provides for the regulation and licensure of residential mortgage lenders and servicers by the Commissioner of Corporations. A willful violation of any provision of those acts is a crime.

This bill would prohibit real estate licensees from charging or receiving an advance fee, and finance lenders and brokers and residential mortgage lenders and servicers from charging or receiving any interest or charge, for performing services for borrowers in connection with the modification of the terms of a loan secured directly or collaterally by a lien on single-family residential real property, except as specified. The bill would also require any person who, for compensation, solicits customers for mortgage loan modifications to provide a specified 10-point bold type statement regarding loan modification fees, and would prohibit those persons from receiving any preperformance compensation, as specified, or requiring any security as collateral for

final compensation. The bill would also provide that a real estate licensee who fails to comply with specified provisions related to mortgages would be subject to disciplinary action by the Real Estate Commissioner. The bill would add to the California Finance Lenders Law a prohibition on making any false, deceptive, or misleading statement or representation in connection with a loan.

Because a violation of these provisions by certain licensees may be punished as crimes under their respective licensing laws, this bill would impose a state-mandated local program.

(2) Existing law defines a foreclosure consultant as a person who offers, for compensation, to perform specified services for a homeowner relating to a foreclosure sale, and imposes regulations upon foreclosure consultants when servicing a foreclosure sale, as specified. Existing law excludes specified persons from the definition of a foreclosure consultant, including a person licensed under the Real Estate Law when making a direct loan or engaging in specified acts, and a person licensed to make loans as a finance lender, subject to the authority of the Commissioner of Corporations to terminate this exclusion, as specified.

This bill would instead specify that a real estate licensee and a finance lender are excluded from the definition of a foreclosure consultant when acting under the authority of that person's license, and would delete the commissioner's authority to terminate the finance lender's exclusion. The bill would also delete obsolete statutory references from those provisions.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 10085.5 of the Business and Professions
- 2 Code is amended to read:
- 3 10085.5. (a) It shall be unlawful for any person to claim,
- 4 demand, charge, receive, collect, or contract for an advance fee
- 5 (1) for soliciting lenders on behalf of borrowers or performing
- 6 services for borrowers in connection with loans to be secured

1 directly or collaterally by a lien on real property, before the
2 borrower becomes obligated to complete the loan—~~or~~, (2) for
3 performing *services for borrowers in connection with the*
4 *modification of the terms of a loan secured directly or collaterally*
5 *by a lien on single-family residential real property, or (3) for*
6 *performing* any other activities for which a license is required,
7 unless the person is a licensed real estate broker and has complied
8 with the provisions of this part.

9 (b) This section does not prohibit the acceptance or receipt of
10 an advance fee by any bank, savings association, credit union,
11 industrial loan company, or person acting within the scope of a
12 license issued to that person pursuant to Division 9 (commencing
13 with Section 22000) of the Financial Code, in connection with
14 loans to be secured directly or collaterally by a lien on real
15 property. This section does not apply to charges made by title
16 insurers and controlled escrow companies pursuant to Chapter 1
17 (commencing with Section 12340) of Part 6 of Division 2 of the
18 Insurance Code.

19 (c) A violation of this section is a public offense punishable by
20 a fine not exceeding ten thousand dollars (\$10,000), by
21 imprisonment in the county jail for a term not to exceed six months,
22 or by both that fine and imprisonment, or if by a corporation, the
23 violation is punishable by a fine not exceeding fifty thousand
24 dollars (\$50,000).

25 SEC. 2. Section 10147.6 is added to the Business and
26 Professions Code, to read:

27 10147.6. Any licensee who solicits customers for the purpose
28 of helping negotiate a mortgage loan modification or other form
29 of mortgage loan forbearance for a fee or other form of
30 compensation, or who otherwise offers to perform these services
31 for a borrower for a fee or other form of compensation, shall
32 provide the following statement in not less than 10-point bold type
33 to the borrower, prior to entering into any fee agreement with the
34 borrower:

35
36 IT IS NOT NECESSARY TO PAY A THIRD PARTY TO
37 ARRANGE FOR A LOAN MODIFICATION OR OTHER FORM
38 OF FORBEARANCE FROM YOUR MORTGAGE LENDER
39 OR SERVICER. NONPROFIT HOUSING COUNSELING
40 AGENCIES OFFER THESE AND OTHER FORMS OF

1 BORROWER ASSISTANCE FREE OF CHARGE. A LIST OF
2 NONPROFIT HOUSING COUNSELING AGENCIES
3 APPROVED BY THE UNITED STATES DEPARTMENT OF
4 HOUSING AND URBAN DEVELOPMENT (HUD) IS
5 AVAILABLE FROM YOUR LOCAL HUD OFFICE OR BY
6 VISITING WWW.HUD.GOV.

7
8 SEC. 3. Section 10177 of the Business and Professions Code
9 is amended to read:

10 10177. The commissioner may suspend or revoke the license
11 of a real estate licensee, or may deny the issuance of a license to
12 an applicant, who has done any of the following, or may suspend
13 or revoke the license of a corporation, or deny the issuance of a
14 license to a corporation, if an officer, director, or person owning
15 or controlling 10 percent or more of the corporation's stock has
16 done any of the following:

17 (a) Procured, or attempted to procure, a real estate license or
18 license renewal, for himself or herself or a salesperson, by fraud,
19 misrepresentation, or deceit, or by making a material misstatement
20 of fact in an application for a real estate license, license renewal,
21 or reinstatement.

22 (b) Entered a plea of guilty or nolo contendere to, or been found
23 guilty of, or been convicted of, a felony, or a crime substantially
24 related to the qualifications, functions, or duties of a real estate
25 licensee, and the time for appeal has elapsed or the judgment of
26 conviction has been affirmed on appeal, irrespective of an order
27 granting probation following that conviction, suspending the
28 imposition of sentence, or of a subsequent order under Section
29 1203.4 of the Penal Code allowing that licensee to withdraw his
30 or her plea of guilty and to enter a plea of not guilty, or dismissing
31 the accusation or information.

32 (c) Knowingly authorized, directed, connived at, or aided in the
33 publication, advertisement, distribution, or circulation of a material
34 false statement or representation concerning his or her designation
35 or certification of special education, credential, trade organization
36 membership, or business, or concerning a business opportunity or
37 a land or subdivision, as defined in Chapter 1 (commencing with
38 Section 11000) of Part 2, offered for sale.

39 (d) Willfully disregarded or violated the Real Estate Law (Part
40 1 (commencing with Section 10000)) or Chapter 1 (commencing

1 with Section 11000) of Part 2 or the rules and regulations of the
2 commissioner for the administration and enforcement of the Real
3 Estate Law and Chapter 1 (commencing with Section 11000) of
4 Part 2.

5 (e) Willfully used the term “realtor” or a trade name or insignia
6 of membership in a real estate organization of which the licensee
7 is not a member.

8 (f) Acted or conducted himself or herself in a manner that would
9 have warranted the denial of his or her application for a real estate
10 license, or has either had a license denied or had a license issued
11 by another agency of this state, another state, or the federal
12 government revoked or suspended for acts that, if done by a real
13 estate licensee, would be grounds for the suspension or revocation
14 of a California real estate license, if the action of denial, revocation,
15 or suspension by the other agency or entity was taken only after
16 giving the licensee or applicant fair notice of the charges, an
17 opportunity for a hearing, and other due process protections
18 comparable to the Administrative Procedure Act (Chapter 3.5
19 (commencing with Section 11340), Chapter 4 (commencing with
20 Section 11370), and Chapter 5 (commencing with Section 11500)
21 of Part 1 of Division 3 of Title 2 of the Government Code), and
22 only upon an express finding of a violation of law by the agency
23 or entity.

24 (g) Demonstrated negligence or incompetence in performing
25 an act for which he or she is required to hold a license.

26 (h) As a broker licensee, failed to exercise reasonable
27 supervision over the activities of his or her salespersons, or, as the
28 officer designated by a corporate broker licensee, failed to exercise
29 reasonable supervision and control of the activities of the
30 corporation for which a real estate license is required.

31 (i) Has used his or her employment by a governmental agency
32 in a capacity giving access to records, other than public records,
33 in a manner that violates the confidential nature of the records.

34 (j) Engaged in any other conduct, whether of the same or a
35 different character than specified in this section, which constitutes
36 fraud or dishonest dealing.

37 (k) Violated any of the terms, conditions, restrictions, and
38 limitations contained in an order granting a restricted license.

39 (l) (1) Solicited or induced the sale, lease, or listing for sale or
40 lease of residential property on the ground, wholly or in part, of

1 loss of value, increase in crime, or decline of the quality of the
2 schools due to the present or prospective entry into the
3 neighborhood of a person or persons having a characteristic listed
4 in subdivision (a) or (d) of Section 12955 of the Government Code,
5 as those characteristics are defined in Sections 12926, 12926.1,
6 subdivision (m), and paragraph (1) of subdivision (p) of Section
7 12955, and Section 12955.2 of the Government Code.

8 (2) Notwithstanding paragraph (1), with respect to familial
9 status, paragraph (1) shall not be construed to apply to housing for
10 older persons, as defined in Section 12955.9 of the Government
11 Code. With respect to familial status, nothing in paragraph (1)
12 shall be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11,
13 and 799.5 of the Civil Code, relating to housing for senior citizens.
14 Subdivision (d) of Section 51 and Section 1360 of the Civil Code
15 and subdivisions (n), (o), and (p) of Section 12955 of the
16 Government Code shall apply to paragraph (1).

17 (m) Violated the Franchise Investment Law (Division 5
18 (commencing with Section 31000) of Title 4 of the Corporations
19 Code) or regulations of the Commissioner of Corporations
20 pertaining thereto.

21 (n) Violated the Corporate Securities Law of 1968 (Division 1
22 (commencing with Section 25000) of Title 4 of the Corporations
23 Code) or the regulations of the Commissioner of Corporations
24 pertaining thereto.

25 (o) Failed to disclose to the buyer of real property, in a
26 transaction in which the licensee is an agent for the buyer, the
27 nature and extent of a licensee's direct or indirect ownership
28 interest in that real property. The direct or indirect ownership
29 interest in the property by a person related to the licensee by blood
30 or marriage, by an entity in which the licensee has an ownership
31 interest, or by any other person with whom the licensee has a
32 special relationship shall be disclosed to the buyer.

33 (p) Violated Article 6 (commencing with Section 10237).

34 (q) *Violated or failed to comply with Chapter 2 (commencing*
35 *with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil*
36 *Code, related to mortgages.*

37 If a real estate broker that is a corporation has not done any of
38 the foregoing acts, either directly or through its employees, agents,
39 officers, directors, or persons owning or controlling 10 percent or
40 more of the corporation's stock, the commissioner may not deny

1 the issuance of a real estate license to, or suspend or revoke the
2 real estate license of, the corporation, provided that any offending
3 officer, director, or stockholder, who has done any of the foregoing
4 acts individually and not on behalf of the corporation, has been
5 completely disassociated from any affiliation or ownership in the
6 corporation.

7 SEC. 4. Section 2944.6 is added to the Civil Code, to read:

8 2944.6. Notwithstanding any other provision of law, any person
9 who solicits customers for the purpose of helping negotiate a
10 mortgage loan modification or other form of mortgage loan
11 forbearance for a fee or other compensation, or who otherwise
12 offers to perform these services for a borrower for a fee or other
13 compensation, shall provide the following statement in not less
14 than 10-point bold type to the borrower, prior to entering into any
15 fee agreement with the borrower:

16
17 IT IS NOT NECESSARY TO PAY A THIRD PARTY TO
18 ARRANGE FOR A LOAN MODIFICATION OR OTHER FORM
19 OF FORBEARANCE FROM YOUR MORTGAGE LENDER
20 OR SERVICER. NONPROFIT HOUSING COUNSELING
21 AGENCIES OFFER THESE AND OTHER FORMS OF
22 BORROWER ASSISTANCE FREE OF CHARGE. A LIST OF
23 NONPROFIT HOUSING COUNSELING AGENCIES
24 APPROVED BY THE UNITED STATES DEPARTMENT OF
25 HOUSING AND URBAN DEVELOPMENT (HUD) IS
26 AVAILABLE FROM YOUR LOCAL HUD OFFICE OR BY
27 VISITING WWW.HUD.GOV.

28
29 SEC. 5. Section 2944.7 is added to the Civil Code, to read:

30 2944.7. Notwithstanding any other provision of law, it shall
31 be unlawful for any person who solicits customers for the purpose
32 of helping negotiate a mortgage loan modification or other form
33 of mortgage loan forbearance for a fee or other compensation, or
34 who otherwise offers to perform these services for a borrower for
35 a fee or other compensation, to do either of the following:

36 (a) Claim, demand, charge, collect, or receive any compensation
37 until after the person has fully performed each and every service
38 the person contracted to perform or represented that he or she
39 would perform.

(b) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.

SEC. 6. Section 2945.1 of the Civil Code is amended to read: 2945.1. The following definitions apply to this chapter:

(a) “Foreclosure consultant” means any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:

(1) Stop or postpone the foreclosure sale.

(2) Obtain any forbearance from any beneficiary or mortgagee.

(3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.

(4) Obtain any extension of the period within which the owner may reinstate his or her obligation.

(5) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.

(6) Assist the owner to obtain a loan or advance of funds.

(7) Avoid or ameliorate the impairment of the owner’s credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.

(8) Save the owner’s residence from foreclosure.

(9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner’s residence.

(b) A foreclosure consultant does not include any of the following:

(1) A person licensed to practice law in this state when the person renders service in the course of his or her practice as an attorney at law.

(2) A person licensed under Division 3 (commencing with Section 12000) of the Financial Code when the person is acting as a prorater as defined therein.

(3) A person licensed under Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code when the person makes a direct loan or when the person (A) engages in

1 acts whose performance requires licensure under that part, (B) is
2 entitled to compensation for the acts performed in connection with
3 the sale of a residence in foreclosure or with the arranging of a
4 loan secured by a lien on a residence in foreclosure, (C) does not
5 claim, demand, charge, collect, or receive any compensation until
6 the acts have been performed or cannot be performed because of
7 an owner's failure to make the disclosures set forth in Section
8 10243 of the Business and Professions Code or failure to accept
9 an offer from a purchaser or lender ready, willing, and able to
10 purchase a residence in foreclosure or make a loan secured by a
11 lien on a residence in foreclosure on the terms prescribed in a
12 listing or a loan agreement, and (D) does not acquire any interest
13 in a residence in foreclosure directly from an owner for whom the
14 person agreed to perform the acts other than as a trustee or
15 beneficiary under a deed of trust given to secure the payment of a
16 loan or that compensation. For the purposes of this paragraph, a
17 "direct loan" means a loan of a real estate broker's own funds
18 secured by a deed of trust on the residence in foreclosure, which
19 loan and deed of trust the broker in good faith attempts to assign
20 to a lender, for an amount at least sufficient to cure all of the
21 defaults on obligations which are then subject to a recorded notice
22 of default, provided that, if a foreclosure sale is conducted with
23 respect to the deed of trust, the person conducting the foreclosure
24 sale has no interest in the residence in foreclosure or in the outcome
25 of the sale and is not owned, controlled, or managed by the lending
26 broker; the lending broker does not acquire any interest in the
27 residence in foreclosure directly from the owner other than as a
28 beneficiary under the deed of trust; and the loan is not made for
29 the purpose or effect of avoiding or evading the provisions of this
30 article *is acting under the authority of that license.*

31 (4) A person licensed under Chapter 1 (commencing with
32 Section 5000) of Division 3 of the Business and Professions Code
33 when the person is acting in any capacity for which the person is
34 licensed under those provisions.

35 (5) A person or his or her authorized agent acting under the
36 express authority or written approval of the Department of Housing
37 and Urban Development or other department or agency of the
38 United States or this state to provide services.

1 (6) A person who holds or is owed an obligation secured by a
2 lien on any residence in foreclosure when the person performs
3 services in connection with this obligation or lien.

4 (7) Any person licensed to make loans pursuant to Division 9
5 (commencing with Section 22000), ~~10 (commencing with Section~~
6 ~~24000), or 11 (commencing with Section 26000)~~ of the Financial
7 Code, ~~subject to the authority of the Commissioner of Corporations~~
8 ~~to terminate this exclusion, after notice and hearing, for any person~~
9 ~~licensed pursuant to any of those divisions upon a finding that the~~
10 ~~licensee is found to have engaged in practices described in~~
11 ~~subdivision (a) of Section 2945 when the person is acting under~~
12 ~~the authority of that license.~~

13 (8) Any person or entity doing business under any law of this
14 state, or of the United States relating to banks, trust companies,
15 savings and loan associations, industrial loan companies, pension
16 trusts, credit unions, insurance companies, or any person or entity
17 authorized under the laws of this state to conduct a title or escrow
18 business, or a mortgagee which is a United States Department of
19 Housing and Urban Development approved mortgagee and any
20 subsidiary or affiliate of the above, and any agent or employee of
21 the above while engaged in the business of these persons or entities.

22 (9) A person licensed as a residential mortgage lender or servicer
23 pursuant to Division 20 (commencing with Section 50000) of the
24 Financial Code, when acting under the authority of that license.

25 (c) Notwithstanding subdivision (b), any person who provides
26 services pursuant to paragraph (9) of subdivision (a) is a foreclosure
27 consultant unless he or she is the owner's attorney.

28 (d) "Person" means any individual, partnership, corporation,
29 limited liability company, association or other group, however
30 organized.

31 (e) "Service" means and includes, but is not limited to, any of
32 the following:

33 (1) Debt, budget, or financial counseling of any type.

34 (2) Receiving money for the purpose of distributing it to
35 creditors in payment or partial payment of any obligation secured
36 by a lien on a residence in foreclosure.

37 (3) Contacting creditors on behalf of an owner of a residence
38 in foreclosure.

39 (4) Arranging or attempting to arrange for an extension of the
40 period within which the owner of a residence in foreclosure may

1 cure his or her default and reinstate his or her obligation pursuant
2 to Section 2924c.

3 (5) Arranging or attempting to arrange for any delay or
4 postponement of the time of sale of the residence in foreclosure.

5 (6) Advising the filing of any document or assisting in any
6 manner in the preparation of any document for filing with any
7 bankruptcy court.

8 (7) Giving any advice, explanation or instruction to an owner
9 of a residence in foreclosure which in any manner relates to the
10 cure of a default in or the reinstatement of an obligation secured
11 by a lien on the residence in foreclosure, the full satisfaction of
12 that obligation, or the postponement or avoidance of a sale of a
13 residence in foreclosure pursuant to a power of sale contained in
14 any deed of trust.

15 (8) Arranging or attempting to arrange for the payment by the
16 beneficiary, mortgagee, trustee under a power of sale, or counsel
17 for the beneficiary, mortgagee, or trustee, of the remaining proceeds
18 to which the owner is entitled from a foreclosure sale of the
19 owner's residence in foreclosure. Arranging or attempting to
20 arrange for the payment shall include any arrangement where the
21 owner transfers or assigns the right to the remaining proceeds of
22 a foreclosure sale to the foreclosure consultant or any person
23 designated by the foreclosure consultant, whether that transfer is
24 effected by agreement, assignment, deed, power of attorney, or
25 assignment of claim.

26 (f) "Residence in foreclosure" means a residence in foreclosure
27 as defined in Section 1695.1.

28 (g) "Owner" means a property owner as defined in Section
29 1695.1.

30 (h) "Contract" means any agreement, or any term thereof,
31 between a foreclosure consultant and an owner for the rendition
32 of any service as defined in subdivision (e).

33 SEC. 7. Section 22161 of the Financial Code is amended to
34 read:

35 22161. (a) *No person shall make a false, deceptive, or*
36 *misleading statement or representation in connection with a loan.*

37 (b) No person shall advertise, print, display, publish, distribute,
38 or broadcast, or cause or permit to be advertised, printed, displayed,
39 published, distributed, or broadcast in any manner, any statement
40 or representation with regard to the business subject to the

1 provisions of this division, including the rates, terms, or conditions
2 for making or negotiating loans, that is false, misleading, or
3 deceptive, or that omits material information that is necessary to
4 make the statements not false, misleading, or deceptive, or in the
5 case of a licensee, that refers to the supervision of the business by
6 the state or any department or official of the state.

7 SEC. 8. Section 22301 of the Financial Code is amended to
8 read:

9 22301. (a) No licensee shall directly or indirectly charge,
10 contract for, or receive any interest or charge of any nature with
11 respect to a loan of five thousand dollars (\$5,000) or more unless
12 the loan is made.

13 (b) Notwithstanding subdivision (a), whenever a loan of five
14 thousand dollars (\$5,000) or more is not consummated because of
15 the borrower's failure to disclose outstanding liens or other
16 information essential to making the loan or solely because of the
17 borrower's failure to complete the loan in accordance with the
18 loan application, a licensee may charge, contract for, and receive
19 an amount equal to the actual expenses incurred by the licensee
20 in connection with the preparation for the loan.

21 *(c) No licensee shall directly or indirectly charge, contract for,*
22 *or receive any interest or charge of any nature for performing*
23 *services for a borrower in connection with the modification of the*
24 *terms of a loan secured directly or collaterally by a lien on*
25 *single-family residential real property. Nothing in this section*
26 *precludes a licensee from collecting interest or other charges*
27 *pursuant to the terms of a loan that has been modified.*

28 SEC. 9. Section 50002.5 is added to the Financial Code, to
29 read:

30 50002.5. No licensee shall directly or indirectly charge, contract
31 for, or receive any interest or charge of any nature for performing
32 services for a borrower in connection with the modification of the
33 terms of a loan secured directly or collaterally by a lien on
34 single-family residential real property. Nothing in this section
35 precludes a licensee from collecting interest or other charges
36 pursuant to the terms of a loan that has been modified.

37 SEC. 10. No reimbursement is required by this act pursuant to
38 Section 6 of Article XIII B of the California Constitution because
39 the only costs that may be incurred by a local agency or school
40 district will be incurred because this act creates a new crime or

1 infraction, eliminates a crime or infraction, or changes the penalty
2 for a crime or infraction, within the meaning of Section 17556 of
3 the Government Code, or changes the definition of a crime within
4 the meaning of Section 6 of Article XIII B of the California
5 Constitution.

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